Statement # 15

Procedures for Resolving Federal Personnel Disputes

(Adopted December 14, 1989)

In 1978, Congress enacted the most comprehensive revision of the federal civil service laws since the Pendleton Act of 1883. The Civil Service Reform Act (CSRA) of 1978 created new institutions and processes for personnel management, including a substantially restructured system for considering complaints, grievances and appeals filed by federal employees in response to personnel actions.[1] Personnel disputes typically involve such matters as removals from the service, reductions in pay or grade, suspensions, furloughs, promotion and award decisions, and reductions-in-force.

Congress' 1978 revision of the framework for considering employee complaints, grievances and appeals was in part prompted by the confusing, complex and time-consuming nature of the existing procedures. Moreover, the procedures were seen as intimidating to both managers and employees and, therefore, likely to deter managers from taking appropriate personnel action and to discourage employees from pursuing available avenues to vindicate their rights. There was also a perception that the Civil Service Commission was unsympathetic to employee discrimination cases and to unions.

The statutory framework created in 1978, with its new forums for adjudicating employee claims, was no less complex and has continued to produce costs, delays, and

[1] Five institutions share in the administration of the CSRA:
1. Office of Personnel Management (OPM), which is vested with the general authority to execute, administer and enforce the laws and rules governing the civil service except with respect to those functions vested in other agencies;
2. Merit Systems Protection Board (MSPB), which is an independent adjudicatory body charged with hearing and deciding employee appeals from agency personnel actions of various kinds including major performance and disciplinary actions;
3. Office of the Special Counsel (OSC), which is charged with the investigation and prosecution before the MSPB of requests for corrective and disciplinary action when prohibited personnel practices have allegedly occurred;
4. Equal Employment Opportunity Commission (EEOC), which enforces various anti-discrimination statutes as they apply to both public and private employment, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Rehabilitation Act; and
5. Federal Labor Relations Authority (FLRA), which is an independent agency charged with hearing and deciding complaints of unfair labor practices and reviewing arbitration awards on matters falling within the scope of negotiated grievance procedures established by collective bargaining agreements.

confusion, accompanied by substantial resource commitments. Close scrutiny discloses that this complexity was in large part created by the tension inherent in the simultaneous pursuit of three important legislative goals: adequate protection of employees from discrimination;[2] uniformity in federal personnel management; and solidification and expansion of the place of arbitration as a mechanism to resolve federal employee grievances.

As a general principle, procedures for handling federal employee disputes should be as simple and fair as feasible. Fairness must include a concern for the timely, final resolution of claims. At the same time, however desirable procedural simplification may be, federal employees and managers alike should have confidence in the processes for adjudicating personnel disputes. This is especially true when a federal employee contests a personnel action on the grounds of discrimination, since nothing is more basic than the right to be free of invidious discrimination.

To address these matters, the Administrative Conference commissioned a consultant's report.[3] The report describes the historical background to the 1978 reforms, along with the institutional and procedural framework created by the CSRA. It examines the operation of the system and makes specific recommendations for legislative and administrative changes. The Conference's Committee on Governmental Processes has held numerous meetings to consider the report, has provided opportunity for public participation in those meetings, and has invited public comment on various procedural changes that might be recommended.

This process has demonstrated the continuing importance of employee and management concerns in addressing the procedural questions that are the subject of the study. The intricate web of processes, consciously designed by Congress in its enactment of the CSRA, resulted in part from substantive policy and value judgments that transcend the domain of administrative procedure. The complex framework has been perceived by employees and their representatives as providing necessary protection against possible arbitrary employer action, particularly in cases where discrimination is alleged. As a result, employees may perceive proposed procedural simplification as a potential threat to substantive rights.

For this reason, whether to retain or modify the present procedures must be resolved largely through the legislative process. The experience of the past decade, as described in the

[2] "Discrimination" refers to discrimination on the basis of race, color, religion, sex, national origin, age, and handicapping condition.

[3] William V. Luneburg, The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions, 78 Ky. L. J. 1 (1989).

consultant's report, has persuaded the Administrative Conference that the time is ripe for fresh consideration by Congress of the problems that gave rise to the CSRA and to the issues that have developed subsequently. In fact, Congress has started to re-examine selected aspects of the system, including equal employment opportunity. In addition, the EEOC has issued a notice of proposed rulemaking to change substantially the federal sector discrimination complaint process.[4]

This Statement describes certain important issues that we believe should be addressed as part of a comprehensive congressional review of the CSRA processes. These include:

(i) Whether there should be one rather than the present two opportunities for a full scale trial-type proceeding in cases raising claims of discrimination;

(ii) Whether to retain the existing complex structure for administrative adjudication of "mixed" cases, i.e., those in which the employee alleges that unlawful discrimination was the basis for an adverse personnel action;

(iii) Whether the government should have the right to appeal to the courts in cases involving claims of discrimination;

(iv) Whether employees or their unions should be permitted to seek judicial enforcement of arbitral awards; and

(v) Whether the functioning of existing adjudicatory frameworks—grievance systems of individual agencies, agency complaint processes for discrimination cases, the MSPB process and the various negotiated grievance processes—could and should be improved.

These questions cannot and should not be examined in isolation, as any review of the procedures of the CSRA should recognize the integrated nature of the complex processes of the Act. Whether or not congressional re-examination takes place, this Statement also suggests that the Office of Personnel Management and agencies scrutinize and, where appropriate, seek ways to improve the patterns of communication within agencies and to employees regarding the workings of the complaint, grievance and appeal system. The Conference encourages the creative use of alternative means of dispute resolution in resolving employee claims.[5]

A. Need for Comprehensive Overview

[4] See "Federal Sector Equal Employment Opportunity" (29 CFR part 1614), 54 Fed. Reg. 45747 (October 31, 1989).
[5] See Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution, 1 CFR 305.86-3.

In considering the issues posed below, Congress should take into account the fact that the intricate federal personnel scheme consists of numerous interrelated processes and institutions. Accordingly, statutory changes should be enacted only after careful consideration of their potential direct and indirect consequences throughout the system for resolving employee complaints, grievances and appeals.

B. Cases Raising Claims of Discrimination

1. *The Number of Hearings in Mixed Cases*. "Mixed" cases are controversies involving personnel actions appealable to the MSPB, where an employee alleges that unlawful discrimination was a basis for the agency's action. These cases are "mixed" in that they involve issues both of civil service law and employment discrimination. Under present law federal employees, unlike employees in the private sector, on allegations of employment discrimination in such cases, have a right to a full trial-type administrative hearing (at the MSPB) and, if unsuccessful, may obtain a second *de novo* adjudicatory hearing in United States District Court. The question for congressional consideration is whether an employee who has chosen a trial-type administrative hearing in a mixed case, and has then been afforded the opportunity for a full evidentiary hearing on the record on all relevant matters, should be entitled to a judicial trial *de novo* or should be limited to judicial review in a court of appeals on the administrative record under the substantial evidence test, the customary venue and scope of review of formal administrative adjudications.

2. *The Process for Deciding Mixed Cases*. The statutory procedure for mixed cases provides the opportunity for sequential consideration by the MSPB and the EEOC, with the possibility of further proceedings before a Special Panel consisting of one member of the MSPB, one member of the EEOC, and a chairman appointed by the President for a term of six years with the advice and consent of the Senate. Through these provisions, the CSRA embodies Congress' effort to bring to bear both the MSPB's expertise in general issues of personnel law and the EEOC's expertise with discrimination issues. This complex procedure is intended to achieve a balanced use of both agencies' expertise.

In most mixed cases presented to the EEOC, the Commission has accepted the MSPB decision and, where it has not, the MSPB has generally deferred to the Commission's disposition of these cases. During the first ten years of the CSRA, there have been only three Special Panel proceedings, indicating that the two agencies have failed to reach an accommodation in only a very limited number of cases. Even where a Special Panel was unnecessary, however, sequential consideration by the MSPB and the EEOC has required

significant time and effort and has at times led to confusion on the part of agencies and claimants. The question for congressional consideration is whether experience confirms the desirability of dual agency participation in mixed cases or whether that experience suggests that consistently fair and more timely results may be achieved through a less complex process.

3. *Government's Right to Appeal*. Under existing law the government may petition for judicial review of certain administrative and arbitral decisions in personnel cases that present significant issues of civil service law. The availability of such review is either uncertain or non-existent when those decisions implicate issues of discrimination law.[6] There is disagreement over the desirability of permitting the government to seek a judicial resolution of legal issues that have been decided adversely to the government at the administrative level.

The question for congressional consideration is whether in the interest of consistency the government should have the right to judicial review (or at least the authority to petition for it) in cases where the Director of OPM determines that an administrative or arbitral decision constitutes an incorrect interpretation of civil service or discrimination law that may have a substantial impact. The primary countervailing considerations are the increased potential for further delay in final resolution of such cases and whether the executive branch should be authorized to seek judicial resolution of disputes between two of its agencies, as would be the case if OPM were permitted to appeal from adverse determinations of the EEOC.

C. Enforcement of Arbitration Awards

Although federal employee grievance arbitration awards are intended to be binding, federal agencies do not always comply with them. Under the CSRA, the only mechanism available to a federal employee seeking to enforce an arbitral award is an unfair labor practice proceeding before the FLRA. Such a proceeding requires filing of a complaint by the Authority's General Counsel and a hearing before the FLRA, followed by judicial review and enforcement of the resulting FRLA order. There is substantial dispute over the question whether an employing agency may raise any defense to an enforcement action other than compliance with the arbitral award.

Questions for congressional consideration include whether to permit an employee or union to seek direct judicial enforcement of federal sector grievance arbitration awards, where such enforcement should take place, and what issues should be open for litigation in the

[6] See, e.g., *Moore v. Devine*, 780 F.2d 1559 (11th Cir. 1986).

chosen forum. A central issue is whether permitting such direct enforcement actions would increase or decrease the likelihood of voluntary agency compliance with arbitration awards.

D. Need to Examine Existing Adjudicatory Systems

1. *Agency Administrative Grievance Systems*. Agency administrative systems have taken on increasing importance as the only avenue of redress[7] available to an individual employee in cases not falling within MSPB or EEOC jurisdiction or within the scope of a negotiated grievance procedure. The Office of Personnel Management and other agencies should ensure that these systems in fact provide fair, efficient, and timely resolution of workplace disputes, and further studies of the structure and usage of these systems may be needed.[8] In reviewing these processes, agencies should give careful consideration to alternative means of dispute resolution.

2. *Agency Complaint Processes in Discrimination Cases*. Over the years, criticism has been leveled at the quality and timeliness of agency disposition of discrimination complaints. The EEOC and individual employing agencies should continue to take steps to ensure adequate and expeditious investigation and timely, final resolution of such claims. Experimentation with, and incorporation of, alternative dispute resolution techniques may be useful.

3. *MSPB and Negotiated Grievance Systems.* The MSPB process and the various negotiated grievance processes dispose of large numbers of significant employee claims. Concerns have been expressed regarding certain aspects of their operation, including the familiarity of arbitrators with federal personnel law and the need for increasing the statutory independence of the MSPB's administrative judges. These concerns may warrant further study.

E. Better Communication Within Agencies and to Employees

Multiple avenues for relief present the danger of parallel, duplicate proceedings. Agencies should take steps to ensure that there are consistent patterns of communication among their personnel, labor relations and equal employment opportunity staffs to reduce the likelihood of parallel, duplicative proceedings in personnel actions for which such duplication is not permitted by law.

[7] See, e.g., *Harrison v. Bowen*, 815 F.2d 1505 (D.C. Cir. 1987).
[8] OPM has recently reviewed the systems established by agencies and has published a study entitled *A Survey of Agency Administrative Grievance Systems* (June 1989).

To use the personnel grievance system effectively, employees must have clear and reliable information about options available to them and the consequence of choosing one route over another. The Office of Personnel Management and other agencies should ensure that there exist readily available and easily understandable written or other materials that inform federal employees of their complaint, grievance and appeal options and the consequences of their choice of one complaint, grievance or appellate route over another.

Citations

54 FR 53498 (December 29, 1989)

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